NOTES

ADMINISTRATIVE LAW

JUDICIAL REVIEW OF SELECTIVE SERVICE ADMINISTRATION—FEDERAL JURISDICTION OF HABEAS CORPUS

A registrant under the Selective Service and Training Act of 1940[1] prayed for *certiorari* for the purpose of reviewing the actions of his Local Draft Board and District Board of Appeals. Counsel for the defendant boards moved for dismissal upon the alternative grounds that the court was without authority to entertain such a petition or to review the actions of such boards. Motion sustained. *Shimola* v. *Local Board No. 42,* 40 F. Supp. 808 (N. D. Ohio 1941).

A draftee in Shimola's position faces three hurdles in any effort to secure judicial review of an adverse ruling on dependency; added together they appear to spell unquestionable defeat. The first, which stopped the principal petitioner, is jurisdictional. There being in the Act itself no express provision for any type of judicial review of the draft boards,[2] resort must be had to an extraordinary writ. The statutory grant to the federal courts of the power "to issue all writs not specifically provided for by statute" [3] limits them to those writs "which may be necessary for the exercise of their respective jurisdictions," and confines their use of such writs, including *certiorari,*[4] to cases within the jurisdictional limitations imposed by Congress.[5] As the principal case points out, no subdivision of Jud. Code §24[6] will give the District Court jurisdiction of a case such as

[1] 54 STAT. 886 (1940), 50 U. S. C. A. Appendix, §301 *et seq.* (Supp. 1940).

[2] 50 U. S. C. A. Appendix §310 (Supp. 1940) Appeal to the president is allowed under certain conditions. One member of the Board of Appeals must have dissented. Executive Order No. 8560, Vol. III, par. 379 (Sept. 16, 1940), 10 U. S. C. Cong. Serv 1224.

[3] Jud. Code No. 262, 28 U. S. C. A. §377.

[4] Also mandamus, prohibition, injunction, and several others clearly inapplicable here.

[5] *Ex parte* Van Orden, 3 Blatchf, 166, 28 Fed. Cas. 1060 (1854); *In re* Massachusetts, 197 U. S. 482 (1905).

[6] 28 U. S C. A. §41.

is here involved; subdivision (1) imposes a threshold amount of *$3000* in cases arising "under the Constitution or laws of the United States," subdivision (12) covers suits involving civil rights only where *damages* are sought, while (14) requires that the deprivation be "under color of any law . . . of any *State*." [7] Specific statutory provision is made, however, for issuance of *habeas corpus* by federal courts "within their respective jurisdictions," [8] jurisdiction in this context being held to mean territorial jurisdiction.[9] The statute thus enlarges the jurisdictional confines of Jud. Code §24 to make the only limitations on issuance of *habeas corpus* in cases involving restraint of liberty, beyond those set out in the statutory provision itself,[10] the territorial jurisdiction of the court and the constitutional grant of federal judicial power.[11] Accordingly, *habeas corpus* was issued or held appropriate, had a sufficient case been made, in several World War I draft cases.[12]

But *habeas corpus* will successfully lift the objecting draftee over the jurisdictional hazard only to present him with a second, much as would *certiorari* could it survive the initial test. Difficulties with the latter writ center around the question of its applicability to administrative decisions[13] and its limitation to abuse of discretion and excess

---

[7] The court pointed out also that Shimola had not yet suffered any deprivation of rights or immunities, with citation to *Petition of Soberman*, 37 F. Supp. 522 (March 6, 1941).

[8] 28 U. S. C. A. §451. Aso see §452, 453.

[9] *Ex parte* Gouyet, 175 Fed. 230 (1909); *Ex parte* Kenyon, 5 Dill 385, 14 Fed. Cas. 353 (1878).

[10] See note 8, *supra*.

[11] See *Ex parte* McCardle, 6 Wall. 318 (1868).

[12] *Ex parte* Hutflis,, 245 Fed. 798 (1917); Arbitman v. Woodside, 258 Fed. 441 (1919); *Ex parte* Cohen, 254 Fed. 711 (1918); See U. S. *ex rel.* Pfeferv v. Bell, 248 Fed. 992 (1918); *In re* Traina, 248 Fed. 1004 (1918); U. S. *ex rel.* Brown v. Commanding Officer, 248 Fed. 1005 (1918); U. S. *ex rel.* Pascher v. Kinkead, 248 Fed. 141 (1918); U. S. *ex rel.* Bartalini v. Mitchell, 248 Fed. 997 (1918); *Ex parte* Platt, 253 Fed. 413 (1918); *Ex parte* Thieret, 268 Fed. 472 (1920); Napore v. Rowe, 256 Fed. 832 (1919); *Ex parte* Romano, 251 Fed. 762 (1918). *Certiorari* would lie if used merely as ancillary to *habeas corpus* in its larger jurisdiction. See *Ex parte* Platt, 253 Fed. 413 (1918). It must be recognized that in decisions with reference to the present draft act the courts have been and probably will be influenced greatly by decisions under the Selective Service Act of 1917. 40 STAT. 76, 50 U. S. C. A. Appendix §201 *et seq.* The provisions of the two Acts and the Presidential proclamations thereunder, as to administration and review of draft boards, are essentially the same. Compare 50 U. S. C. A. Appendix §310 and 10 U. S. C. CONG. SERV. 1224 (1940) with the 50 U. S. C. A. Appendix §204 and Selective Service Regulations—President Wilson, Published by Sec. of War, Nov. 8, 1917. The questions which have arisen and will arise under them are similar. *See* Petition of Soberman, 37 F. Supp. 522, 523 (1941).

[13] *Certiorari* lies to review only "judicial" holdings. Moore v. City Council of City of Perry, 119 Iowa 423 (1903); Garin v. Pelton, 58 Cal. App. 672 (1922); Sirmans v. Owen, 87 Fla. 485 (1924). But no precise definition will distinguish a "judicial" act from a ministerial or discretionary act. Two cases of the 1918 draft denied *certiorari*

of jurisdiction. The majority of cases have held that if the inferior body had jurisdiction, *certiorari* will not lie to correct mere errors committed in the exercise thereof.[14] With *habeas corpus* there is a preliminary obstacle in the degree of restraint necessary to support the writ,[15] followed by the fact that on *habeas corpus* also, inquiry has generally been restricted to a determination as to whether or not the lower tribunal abused its discretion or exceeded its jurisdiction.[16]

Use of *habeas corpus,* however, for inquiry into alleged deprivations of due process of law affords an opportunity to circumvent these limitations of the merit to peripheral matters. for due process

on the grounds that a draft board is an executive body. *In re* Kitzerow, 252 Fed. 865 (1918); U. S. *ex rel.* Roman v. Rauch, 253 Fed. 814 (1918). *But see* Angelus v. Sullivan, 246 Fed. 54 (1917). Acts of commissioners laying out streets are judicial and subject to *certiorari.* Parks v. Boston, 8 Pick. 217, (Mass. 1829); People v. Brighton, 20 Mich. 57 (1870). Such acts are not judicial. Robbins v. Bridgewater, 6 N. H. 524 (1834). In a few jurisdictions *certiorari* will lie to review proceedings not judicial in nature: (municipal ordinance) Treasurer of Camden v. Mulford, 26 N. J. L. 49 (1856); (resolution of city council) State *ex rel.* Johnson v. Clark, 21 N. D. 517 (1911). Other courts have classified acts as "quasi-judicial" in order to justify reviews. (order of board of health) People v. Board of Health, 12 N. Y. Supp. 561 (1891); (division of school district by State Supt. of Schools) State *ex rel.* Moreland v. Whitford, 54 Wis. 150 (1882); (extension of town limits by town council) Lehigh Sewer Pipe & Tile Co. v. Inc. Town of Lehigh, 156 Iowa 386 (1912).

[14] Harris v. Barber, 129 U. S. 366 (1889); *Ex parte* Siebold, 100 U. S. 371 (1879). But *cf.* People *ex rel.* Cook v. Board of Police, 39 N. Y. 506 (1868); see Note (1934) 19 Iowa L. Rev. 609 at 614.

[15] There must be actual confinement or the present means of enforcing it. Wales v. Whitney, 114 U. S. 564 (1885). See FERRIS, EXTRAORDINARY LEGAL REMEDIES, 31. *Habeas corpus* will not issue where the restraint is merely nominal or moral. *In re* Callicot, Fed. Cas. 2323 (1870); Johnson v. Hoy, 227 U. S. 245 (1913). Shimola had been declared available for induction, but had not yet, as far as appears in the report, been inducted. Actual induction is sufficient restraint. In those World War I cases where *habeas corpus* was issued or held appropriate, the relator had either been inducted: Camp Upton, N. Y.: U. S. *ex rel.* Pfeferv v. Bell, 248 Fed. 992 (1918); *In re Traina,* 248 Fed. 1004 (1918); U. S. *ex rel.* Brown v. Commanding Officer, 248 Fed. 1005 (1918); U. S. *ex rel.* Bartalini v. Mitchell, 248 Fed. 997 (1918); *Ex parte* Platt, 253 Fed. 413 (1918); Camp Mead, Md.: Arbitman v. Woodside, 258 Fed. 441 (1919); Camp Lee, Va.: *Ex parte* Cohen, 254 Fed. 711 (1918), or was in custody of the military authorities on some grounds such as desertion. *Ex parte* Hutflis, 245 Fed. 798 (1917); *Ex parte* Thieret, 268 Fed. 472 1920); Napore v. Rowe, 256 Fed. 832 (1919); *Ex parte* Romano, 251 Fed. 762 (1918). The report of ex rel. *Pascher* v. *Kinkead* indicates, however, that the petitioner was in the same situation as Shimola, 248 Fed. 141 (1918).

[16] *Ex parte* Siebold, 100 U. S. 371 (1879): *Ex parte* Crouch, 112 U. S. 178 (1884); *Ex parte* Harding, 120 U. S. 782 (1887); U. S. v. Valente, 264 U. S. 563 (1924). *Contra*: Several courts addressed themselves directly to the Constitutional issues involved. Moore v. Dempsey, 261 U. S. 86 (1923); Dower v. Dunaway 53 F. (2d) 586 (1931), 1 F. Supp 1001 (1932); Mooney v. Holohan, 55 Sup. Ct. 340 (1935); U. S. *ex rel.* Kennedy v. Tyler, 269 U. S. 13 (1925) considered all questions involving the Constitution, laws and treaties of the U. S. To the effect that there is basis for such a rule in 28 U. S. C. A. §453, see (1935) 3 GEO. WASH. L. REV. 253. It has been proposed that the cases were not exceptions to the general rule, the courts issuing the writs in such cases because in their opinions the detention was, by reason of some federal *inhibition,* without jurisdiction. (1924) 9 ST. LOUIS L. REV. 250, 263.

is a literal Pandora's box containing, *inter alia,* a concept of constitutional right to judicial review. Yet for the draftee, evasion of the second hurdle but places him before a third which he can neither take nor avoid. This for the reason that the content of the right to review varies with the subject-matter involved, and is at a minimum in areas akin to that of the conscript.[17] It has been urged that the variations in judicial control evince a favoritism of property over personal rights.[18] As tenable an explanation is that the observable gradations are directly proportional to the relative urgency of the position. Judicial reluctance to interfere has almost always manifested itself in categories of functions where expedition is essential to the success of government: taxation,[19] removal of public officers,[20] customs duties,[21] etc. . . Evidence is judicially weighed in rate-fixing cases[22] while merely its sufficiency is questioned in the closely analogous fields of taxation and condemnation.[23] Even within a particular area the content of the right is directly proportional to exigencies. Thus administrative decisions are final in alien exclusion cases[24] when the number of applicants is great,[25] while independent judicial judgment can to some extent be had where the less often litigated issue of deportation is involved.[26] But whether in conscription cases the courts relax their safeguards because of the absence of property interest or in response to the necessity for immediate selection and training of an army,[27] any inquiry by way of review of administrative action will be shallow, with every presumption

[17] The courts have said "hands off" of Selective Service appeals. *See* DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, (1927) p. 268.

[18] Lett, *Civil Rights, Property, and the Supreme Court,* (1938) 4 OHIO ST. L. J. 183.

[19] Kentucky R. R. Tax Cases, 115 U. S. 321 (1885); Board of Commissioners v. Bullard, 77 Kan. 349 (1908); Symns v. Graves, 65 Kan. 628 (1902).

[20] State *ex rel.* Attorney General v. Hawkins, 44 Ohio St. 98 (1886).

[21] Hilton v. Merritt, 110 U. S. 97 (1884); Earnshaw v. U. S., 146 U. S. 60 (1892).

[22] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920); St. Joseph Stock Yards Co. v. U. S., 11 F. Supp. 322 (1935).

[23] Bauman v. Ross, 167 U. S. 548 (1897); Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 (1896); Crane v. Hahlo, 258 U. S. 142 (1922).

[24] U. S. v. Ju Toy, 198 U. S. 253 (1905); Lloyd Sabaudo Societa Anonima v. Elting, 287 U. S. 329 (1932); U. S. *ex rel.* Chanin v. Williams, 177 Fed. 689 (1910).

[25] *See* VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS (1932), 210.

[26] Ng Fung Ho v. White, 259 U. S. 276 (1922); Moy Suey v. U. S., 147 Fed. 697 (1906); Gee Cue Beng v. U. S., 184 Fed. 383 (1911). *Cf.* Choy Gum v. Backus, 223 Fed. 487 (1915).

[27] The proposition that protection of constitutional rights should be relaxed during times of emergency, was rejected by Mr. Justice Wall in the famous case of *Ex parte Milligan,* 4 Wall. 2 (1886). (Military courts had been trying civilians in non-belligerent territory.) It is interesting to note that *Ex parte Milligan* was decided after the Civil War had ended, while during the war the court refused, upon technical grounds, to act in the one opportunity it had to condemn the practice. *Ex parte Vallandingham,* 1 Wall. 243 (1864).

made in favor of the board's action.[28] A draftee seeking judicial review of fact questions within the board's jurisdiction faces a virtual impassé. L. J. B.

BANKRUPTCY

The Effect Given State Courts' Interpretations of State Taxing Statutes Under Section 64(a)4 of the Bankruptcy Act: The Construction Under Section 64(a)4 of a State Statute Providing for a Tax Alternative in Nature

The City of New York passed an ordinance imposing a tax upon receipts from retail sales made within the corporate limits. In substance, said ordinance contained the following pertinent provisions: the tax to be levied separately from the sale price and same to be collected by the vendor: the tax to be paid to the vendor for, and on account of, the city; the vendor to remit to the city comptroller the sum he owed by reason of sales made whether or not the tax was collected. In the event the vendor failed to make the prescribed tax return and remittance, the ordinance made it mandatory for the vendee to do so. Appropriate remedies were given to the city to enable it to collect the tax from either the vendee or vendor.[1]

In the principal case, a vendor, who did not comply with the ordinance in that he failed to file a return and/or make the necessary remittance, became bankrupt, whereupon the City of New York claimed priority under Section 64 (a) 4 of the Bankruptcy Act for "taxes legally due and owing by the bankrupt".[2] The referee's order allowing the claimed priority was set aside by the District Court. On appeal, the reversal was affirmed on the ground that the tax was not owed by the bankrupt vendor but by the vendee, since the former was only a debtor of the city.[3] The Supreme Court of the United

[28] Another possible influence is suggested by the chronic complaint that layman draft administrators have no special qualifications as "experts" in the field of their decisions. To the effect that when the expertness of the administrators is suspect the arguments against judicial hampering are greatly weakened, see Dickinson, *Judicial Control of Official Discretion*, 22 Amer. Pol. Sci. Rev. 275, 300 (1928). But Selective Service administration, in spite of the serious nature of the matters it treats, is not highly technical. To the effect that no better qualified group could be found, see Lewis, *Legal Phases of the National Selective Service*, 9 Duke B. A. J. 11, (1941).

[1] No. 20, published as No. 21, Local Laws of New York City, 1934, p. 143, as amended, No. 24, published as No. 25, Local Laws of New York City, 1934, p. 164.

[2] 11 U. S. C. A., sec. 104.

[3] *In re* National Studios, Inc., 118 F (2d) 329, 330 (1941).